

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOSH W. CHURCHMAN, ET AL.,

No. C 02-1182 JL

Plaintiffs,

v.

DONALD EVANS, ET AL.,

Defendants.

**ORDER DENYING LEAVE TO AMEND
(Denying Docket # 20, 31)
DISMISSAL WITH PREJUDICE
(Granting Docket # 26)**

Introduction

Before the Court is the motion of Plaintiffs for leave to file a second amended complaint and the motion of Defendants to dismiss Plaintiffs' complaint as moot. The Court requested additional briefing in light of the Court's order granting leave to amend the complaint in another case, *NRDC v Evans*, No. C-01-0421 JL. The parties' briefs convince the Court that Plaintiffs' motion must be denied and Defendants' motion must be granted. Plaintiffs have failed to prosecute their case and in the interim the specifications have been superseded, with no action by Plaintiffs to establish a claim or involve the Court. Consequently, Plaintiffs no longer have a live controversy before this Court, amendment would be futile and prejudicial to Defendants and their complaint must be dismissed.

Background

Plaintiffs in the case at bar are challenging the 2002 Pacific groundfish management specifications. Plaintiffs seek to add to their complaint a claim that the 2003 and 2004 specifications, which are not the subjects of their original complaint, continue to provide higher catch limits to trawl vessels over fixed-gear vessels and that this favoritism violates the Magnuson-Stevens Act. Plaintiffs contend that trawl vessels create disproportionate discard and bycatch mortality among Pacific groundfish. Plaintiffs ask the Court to find that in the case at bar, as in the *NRDC v Evans* case, this Court retains continuing oversight of the Defendants' implementation of the specifications.

Plaintiffs' First Claim takes issue with the limits imposed in the 2002 specifications on the catch of "Yellow Tail, Chili Pepper, Bocaccio, Canary, Ling Cod and Willow." (Pltfs' Proposed 2d Am. Compl. ¶¶14, 22. The Second Claim alleges that Defendant due to the small trip limits for fixed gear vessels, unlawfully failed to include limited entry fixed gear vessels in their bycatch assessment methodology. Pltfs' Prop. 2d Am. Compl. ¶ 26 Plaintiffs also ask this Court to remand the annual specifications to Defendants "with instructions to revise the specifications to comply fully with federal law."

Defendants contend that the only similarity between the two cases, the case at bar and *NRDC v Evans*, is that they both involve the same fishery. They claim the differences are more outstanding than the similarities.

Defendants argue that this Court should deny Plaintiffs' motion and dismiss their complaint as moot. Defendants contend Plaintiffs cannot at this late date seek a declaratory judgment from this Court with regard to the 2002 annual specifications because there is no longer a live controversy, those specifications having been superseded by the 2003 and then the 2004 specifications without any action by Plaintiffs in the interim. Defendants inform the Court they are confused by Plaintiffs' Second Claim, since it appears to implicate both the "Limited Entry Permit" and "West Coast Ground Fish observer program." Pltfs' Prop. 2d Am. Compl. ¶26. Defendants contend that to the extent Plaintiffs seek to add to their complaint a challenge to the groundfish observer program, they are barred by the applicable statute of

1 limitations. Section 305(b) of the Magnuson-Stevens Act, 16 U.S.C. §1855(b), requires that
2 challenges to regulations be filed within thirty days “after the date on which the regulations
3 were promulgated.” The final rule implementing the Groundfish observer program was
4 published in the Federal Register April 24, 2001. 66 Fed. Reg. 20,613 (April 24, 2001); 50
5 C.F.R. §660.360.

6 7 **Analysis and Conclusion re Leave to Amend**

8 In deciding whether to permit amendment of a complaint, the Court considers five
9 factors: (1) bad faith; (2) undue delay; (3) prejudice to the opposing party; (4) futility of the
10 amendment; and (5) whether the plaintiff has previously amended his complaint. *Nunes v*
11 *Ashcroft*, 348 F.3d 815, 818 (9th Cir. 2003) (*citing Bonin v Calderon*, 59 F.3d 815, 845 (9th
12 Cir. 1995). In the case at bar, there is no contention that Plaintiffs are acting in bad faith, but all
13 four other factors are present. Plaintiffs have unduly delayed both in amending their complaint
14 and in failing to timely prosecute their case. This failure to prosecute has allowed their case to
15 become moot. The resulting delay is prejudicial to Defendants and the amendment would be
16 futile, since the relief sought would be completely altered by the change in circumstances
17 since the complaint was filed two years ago.

18 In contrast, the plaintiffs in the *NRDC v. Evans* case brought their case in January 2001
19 and by June and July 2001 the parties were exchanging memoranda on summary judgment.
20 This Court issued its order in August 2001, and an appeal followed. This Court later permitted
21 plaintiffs in that case to amend their complaint to challenge successor specifications which
22 directly pertained to rulings previously issued and still being monitored by the Court. Plaintiffs
23 sought to amend allegations challenging the successor specifications and filed their papers
24 within the statutory time limits under the Magnuson-Stevens Act, even moving for an
25 accelerated briefing schedule in recognition of those limits. Following summary judgment for
26 plaintiffs, this Court had expressly retained jurisdiction and subsequently granted plaintiffs
27 leave to amend their complaint to state a cause of action for alleged violation of the successor
28 specifications on the basis that this Court had retained jurisdiction for the purpose of enforcing

its judgment and that the successor specifications were at least partially in response to the Court's order:

"Defendants themselves acknowledge that Amendment 16 was drafted in response to this Court's August 2001 ruling in this case. See Letter from D. Robert Lohn, Regional Administrator, NMFS to Donald Hansen, Chair, Pacific Fishery Management Council (November 14, 2003) (Exhibit A to Plaintiffs' Motion for Leave to Amend Complaint) ("Amendment 16-1 is also intended to partially respond to a Court order in *Natural Resources Defense Council, Inc. v. Evans*, 168 F.Supp.2d 1149 (N.D.Cal. 2001), in which the court determined that Pacific Coast groundfish rebuilding plans must be in the form of FMP's, FMP amendments or regulations.") 69 Fed.Reg. at 8,862 (same)."

(Docket # 95, order filed May 12, 2004, at pages 4-5)

This Court granted plaintiffs in the *NRDC v Evans* case leave to amend their complaint on the following narrow basis:

"1. A party need not file a new lawsuit to obtain judicial review of a regulation proposed by an agency in response to the Court's remand under the provisions of the Magnuson-Stevens Act and the Administrative Procedures Act.

2. A party may amend its complaint in the action in which the court remanded the previous regulation to obtain judicial review of the proposed replacement regulation for the court to decide whether the proposed regulation complies with the court's order."

Id. at p. 10.

In the case at bar Plaintiffs brought their case in March 2002 and filed their first substantive pleading only now, two years later, to seek to challenge an expired regulation. In the interim, the 2002 specifications have been superseded, first by the 2003 specifications, then by the 2004 specifications. 68 Fed. Reg. 11182-11232 (March 7, 2003); 69 Fed. Reg. 11064-11124 (March 9, 2004). Plaintiffs' reason for their inaction was that they were awaiting the outcome of litigation before Judge Breyer on the 2002 specifications, in *Natural Resources Defense Council v Evans*, C-02-1650 CRB.

However, Plaintiffs never sought to intervene in that case, nor did they even move for leave to submit amicus briefs. Plaintiffs neglect to mention in their motion in the case at bar that Judge Breyer also has two cases pending challenging both the 2003 and 2004 specifications: *Natural Resources Defense Council v Evans*, C-03-1444 CRB and C-04-1370 CRB. The West Coast Seafood Processing Association has participated in the

1 litigation over these specifications as a Defendant-Intervenor. Plaintiffs did not participate in
2 either of these cases, despite asserting that the specifications continue to harm them.

3 Plaintiffs in the case at bar failed to raise timely challenges to either the 2003 or 2004
4 specifications within the statute of limitations set forth in the Magnuson-Stevens Act. See 16
5 U.S.C. §1855(b). Rather, they seek to side-step the statute of limitations by seeking to amend
6 their complaint filed in March 2002 challenging the 2002 specifications.

7 Defendants contend that if Plaintiffs are permitted to amend their complaint to add a
8 challenge to the 2003 specifications and the 2004 specifications, Defendants will be
9 prejudiced. In imposing the statute of limitations under 26 U.S.C. §1855(b) and allowing for
10 expedited review, 16 U.S.C. §1855(f), Congress recognized that the National Marine
11 Fisheries Service, defendant in the case at bar, as well as the entities it regulates, have an
12 interest in expedited resolution of issues affecting fisheries. Plaintiffs unduly delayed
13 prosecuting their case. Permitting them to evade the statute of limitations and revive a
14 dormant claim would prejudice Defendants by reviving moot issues with respect to
15 superseded specifications, despite Plaintiffs' failure to bring timely challenges on their own or
16 participate in any way in the existing court challenges to the 2003 and 2004 specifications.

17 In sum, Plaintiffs failed to prosecute their case and allowed it to become moot. Rule 15,
18 Federal Rules of Civil Procedure, liberally permits amendment of a complaint but not where
19 the objecting party shows prejudice to its ability to maintain its defense on the merits.
20 Defendants in the case at bar demonstrate that permitting Plaintiffs to amend their complaint
21 would prejudice Defendants and defeat the will of Congress favoring expedited resolution of
22 such issues. Further, Plaintiffs have failed to avail themselves of other opportunities to pursue
23 their claim within the statute of limitations by intervening or filing amicus briefs in ongoing
24 litigation over the same specifications they seek to challenge in the case at bar.

25 For all the above reasons, Plaintiffs' motion for leave to amend is denied.

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27 **Defendants' Motion to Dismiss**
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1 Defendants move to dismiss Plaintiffs' complaint as moot. A claim is moot if it has lost
2 its character as a present, live controversy. *American Tunaboat Ass'n. V. Brown*, 67 F.3d
3 1404, 1407 (9th Cir. 1995). In the case at bar, a live case or controversy no longer exists. As
4 discussed above, the 2002 specifications of which Plaintiffs complain have been superseded,
5 first by the 2003 specifications, then by the 2004 specifications. The trip limits and allocations
6 that Plaintiffs challenged in their First Amended Complaint have changed (See Defendants'
7 Reply in Support of Motion to Dismiss at pages 4-5). Those annual specifications are no
8 longer in effect and Plaintiffs can no longer obtain any effective relief with respect to those
9 measures. As a result, Plaintiffs' case with respect to trip limits for Limited Entry Fixed Gear
10 Vessels for the five species listed in their First Amended Complaint for the area between
11 Cape Mendocino and Point Conception for the year 2002 is now moot.

12 The existence of other Pacific groundfish litigation in this judicial district does not
13 change the status of Plaintiffs' complaint. Defendants successfully distinguish cases upon
14 which Plaintiffs rely for the proposition that the availability of relief could render their Complaint
15 not moot, despite the expiration of the objectionable regulations.

16 Plaintiffs cite to *Northwest Environmental Defense Ctr. ("NEDC") v. Gordon*, 849 F.2d
17 1241 (9th Cir. 1988). In that case, plaintiffs challenged management measures published on
18 May 5, 1986. *Id.* at 1244. NEDC filed its complaint on June 4, 1986, alleging violations of the
19 Magnuson-Stevens Act, The Framework Amendment, the Coastal Zone Management Act,
20 and the National Environmental Policy Act. *Id.* On December 4, 1986, after the parties had
21 fully briefed the case, the district court dismissed the action as moot. This was because the
22 salmon season had closed on August 20, 1986. *Id.*

23 The U.S. Court of Appeals for the Ninth Circuit reversed, holding that the close of the
24 1986 salmon season did not moot plaintiffs' claim because effective relief was still available:
25 the next spawning season had not yet occurred. The Ninth Circuit held that the lower court
26 case was not moot as of 1988 because of the salmon's three-year spawning cycle. 1989 was
27 the appropriate year for relief, when the salmon which had been spawned in 1986 returned for
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1 their own spawning runs. 849 F.2d at 1245.

2 This is utterly unlike the case at bar, where annual fishery regulations attempt to control
3 overfishing by setting harvest limits for more than 82 species of fish. Nine of these have been
4 declared overfished, according to the most current scientific information, which is updated
5 annually.

6 The Magnuson-Stevens Act requires that annual specifications be set using the best
7 scientific information available. See 16 U.S.C. §1852(a)(2). Even if this Court were to find that
8 the 2002 specifications were arbitrary and capricious, there would be no effective remedy.
9 Two management cycles have already passed for the 2003 and 2004 specifications and the
10 Council and agency are at work on the 2005 annual specifications. Any injury that has
11 allegedly been done cannot be undone or remedied. The Magnuson-Stevens Act provides for
12 expedited review. See 16 U.S.C. §1855(f)(4). Plaintiffs did nothing for two years. They cannot
13 now propose to use their old complaint to challenge the new specifications.

14 In *NRDC v Evans*, Plaintiffs were permitted to amend their complaint because the
15 specifications they objected to were the subject of ongoing oversight by this Court, pursuant to
16 timely litigation which resulted in remedial action reflected in the successor regulations. In the
17 case at bar, by contrast, the 2002 specifications have not only expired, but have been
18 superseded, with no intervening action by plaintiffs, and consequently no action by the Court to
19 establish jurisdiction.

20 Plaintiffs claim that the existence of other groundfish litigation in this judicial district
21 somehow keeps their claim alive. There is no allocation case in this district, other than theirs.
22 Theirs is the only case where the members of one contingent of the fishing fleet contends that
23 others are unfairly advantaged by the agency specifications. In this case, Plaintiffs claim that
24 the specifications favor fishermen who use trawls over fishermen who use hook and line.
25 Plaintiffs present no justification for failing to prosecute their case for the last two years.

26 Accordingly, for all the above reasons, Plaintiffs' must be and is dismissed with
27 prejudice as moot. The clerk shall close the file.

28 IT IS SO ORDERED.

DATED: July 26, 2004

United States District Court

For the Northern District of California

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/s/ James Larson

James Larson
United States Magistrate Judge